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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Matter of	)	
	)	
Implementation of Section 703(e) of the Telecommunications Act of 1996	)	CC Docket No. 97-151
	)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments	)	
	)	

COMMENTS OF DUQUESNE LIGHT COMPANY

Submitted by:

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September 26, 1997

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EXECUTIVE SUMMARY

Duquesne Light Company ("Duquesne") is an electric utility engaged in the production, transmission, distribution, and sale of electic energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Duquesne accordingly has a vital interest in the outcome of this proceeding.

Duquesne believes that the Commission's proposed adaptation of its current formulaic historic-cost methodology for determining electric pole attachment and conduit rates under Section 224(e) of the Act is contrary to the clear intent of Congress. The language of the Act and its legislative history clearly reflect Congress' intent that charges under Section 224(e) for pole attachments and conduit used by cable systems and telecommunication carriers for providing telecommunication services are to be based on negotiated, market-based rates. The Commission's proposed formulaic approach based upon historical costs is directly contrary to the use of market-based rates envisioned by Congress.

Accordingly, Duquesne urges the Commission to abandon its formulaic historic-cost methodology in favor of a methodology that embraces market-based rates grounded on economic costs, not historical costs. At a minimum, the Commission should adopt a rate methodology that incorporates forward-looking replacement costs as the basis for its rate formula. The Commission should also adopt regulations to ensure good faith negotiations by the providers of telecommunication services before recourse to the Commission. Duquesne elaborates on these comments in Part II of its Comments.

Part III of Duquesne's Comments address the Commission's proposed rate methodology for attachments made to electric utility poles and related issues raised by the Commission. Duquesne's major comment -- keeping with its above concerns -- is that the Commission should abandon its formulaic historical-cost methodology for pole attachments in favor of negotiated, market-based rates or a methodology based on forward-looking, replacement costs. Negotiated market-based rates or rates based on forward-looking, replacement costs would adhere to the Congressional purpose embodied in the 1996 Telecommunications Act for a pro-competitive, deregulated market for the provision of telecommunication services. In Part III, Duquesne also comments on other issues raised by the Commission as follows:

- Duquesne is concerned about the overlashing of lines and urges the Commission to require attachers to notify electric utilities of overlashing. Further, in keeping with the intent of the Act, overlashing of existing lines, particularly on behalf of a new entity, should be considered a new and separate attachment under the Act.

- The leasing of dark fibers to a third party should not be considered a new attachment unless the Commission decides not to treat overlashed facilities of the original attacher as a separate attachment.

- The 40-inch safety span required by the National Electric Safety Code should not be considered usable electric utility space but instead should be treated as unusable space. Its function is to protect communication workers and the space is not usable for attaching electric power supply cables.

- Attaching entities for purposes of apportioning the cost of 2/3 of the unusable pole space under Section 224(e)(2) should be limited to entities providing telecommunication services. Such attaching entities <u>should</u> <u>not</u>

include governmental agencies with attachments or cable attachments used solely to provide cable service.

Duquesne addresses in Part IV of its Comments the Commission's proposed rate methodology for conduits under Section 224(e), which again is an adaptation of its current historical-cost methodology. Wholly apart from being contrary to the Act, as discussed above, the Commission's proposed methodology raises serious concerns because historical-cost recovery for conduit systems -- such as that proposed by the Commission -- would result in the gross under-recovery of the true economic value or cost of electric conduits. Electric conduit systems, such as those of Duquesne's, are often mostly depreciated and the replacement or expansion for electric conduit systems is highly expensive. Therefore, rates based on the recovery of historic costs will not come close to reflecting the true economic replacement costs of Duquesne's electric conduit system. As such, the Commission's proposed conduit methodology could require a unique, valuable resource to be sold at prices far below any reasonable measure of its true economic costs and societal value and would result in Duquesne and its electric customers subsidizing the telecommunication companies' use of its conduit. Such a result would be contrary to Congress' clear intent expressed in Section 224(e) and the 1996 Act as a whole.

Additional major comments of Duquesne with respect to the Commission's proposed conduit methodology include the following:

- The Commission's proposed half-duct methodology, which emanates from rate cases involving telephone conduit, cannot be applied to electric conduit because electric power supply cables and communication company cables cannot share the same duct even if interduct is installed in the duct.

- Any methodology adopted by the Commission (whether based on forward-looking or historical costs) should expressly allow the conduit costs to be determined on a local or project basis, such as for downtown urban areas, city residential areas, or suburban areas, as opposed to a system-wide basis because of the large variations in the costs of electric conduit.

- The Commission's methodology (whether based on forward-looking or historical costs) should expressly recognize that the relevant costs for determining rates under Section 224(e) for access to electric utility conduit include the material and installation costs for the entire conduit system and not just the conduit duct.

Duquesne briefly addresses in Part V of its Comments the Commission's request for comments concerning whether it should adopt a rate methodology to determine a just and reasonable rate for access to utility rights-of-way or whether such rates should be addressed on a case-by-case basis. Duquesne recommends that the Commission address access to utility rights-of-way on a case-by-case basis.

In addition to the comments set forth herein, Duquesne incorporates by reference and relies upon its comments dated June 27, 1997 filed with respect to Docket No. 97-98.

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COMMENTS OF DUQUESNE LIGHT COMPANY

Duquesne Light Company ("Duquesne"), by its attorneys and pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994) and the Commission's Notice of Proposed Rulemaking (the "NPRM") in the above-captioned docket released August 12, 1997, hereby submits its Comments.

The NPRM concerns proposed amendments to the Commission's rules to implement Section 703 of the Telecommunications Act of 1996 (the "1996 Telecommunications Act" or the "1996 Act") which amended Section 224 of the Communications Act of 1934 (the "1934 Act") (referred to together as "the Act"). The NPRM seeks comment on proposed rate formulas for determining rates pursuant to Section 224(e) of the Act for pole attachments and conduit used by cable systems and telecommunication carriers to provide telecommunication service. The NPRM also seeks comment on whether it should develop a similar methodology for rates to be charged for use of rights-of-way. Duquesne's comments are directed towards the proposed rate formulations as they would apply to electric utilities that own poles, conduits and rights-of-way. In addition to the comments set forth below, Duquesne expressly incorporates by reference the comments dated June 27, 1997 that it filed with the Commission concerning Amendment of Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, FCC 97-94, CS Docket No. 97-98 (March 14, 1997) ("March 1997 Pole Attachment Notice").

I. INTRODUCTION

Duquesne Light Company is an electric utility engaged in the production, transmission, distribution, and sale of electric energy. Its service territory is approximately 800 square miles in southwestern Pennsylvania, including Pittsburgh, with a population of over 1.5 million. In addition to serving more than 580,000 retail customers, the company sells electricity at wholesale to other utilities. Duquesne owns many thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Duquesne accordingly has a vital interest in the outcome of this proceeding.

The Commission's proposed adaptation of its current formulaic historic-cost methodology for determining electric pole attachment and conduit rates under Section 224(e) of the Act is contrary to the clear intent of Congress. The language of the Act and its legislative history clearly reflect Congress' intent that charges under

Section 224(e) for pole attachments and conduit used by cable systems and telecommunication carriers for providing telecommunication services are to be based on negotiated, market-based rates. The Commission's proposed formulaic approach based upon historical-costs is directly contrary to the use of market based rates envisioned by Congress. Accordingly, Duquesne urges the Commission to abandon its formulaic historic-cost methodology in favor of a methodology that embraces market-based rates grounded on economic costs, not historical costs. At a minimum, the Commission should adopt a rate methodology that incorporates forward-looking replacement costs as the basis for its rate formula. The Commission should also adopt regulations to ensure good faith negotiations by the providers of telecommunication services before recourse to the Commission. Duquesne elaborates on these comments in Part II of its Comments below.

Part III of Duquesne's Comments address the Commission's proposed rate methodology for attachments made to electric utility poles and related issues raised by the Commission in the NPRM. Duquesne's major comment -- keeping with its above concerns -- is that the Commission should abandon its formulaic historical-cost methodology for pole attachments in favor of negotiated, market-based rates or a methodology based on forward-looking, replacement costs. Negotiated market-based rates or rates based on forward-looking, replacement costs would adhere to the Congressional purpose embodied in the 1996 Telecommunications Act for a pro-competitive, deregulated market for the provision of telecommunication services. In Part III, Duquesne also comments on other issues raised by the Commission. In particular, Duquesne is concerned about the overlashing of lines and urges the

Commission to require attachers to notify electric utilities of overlashing. Further, in keeping with the intent of the Act, overlashing of existing lines, particularly on behalf of a new entity, should be considered a new and separate attachment under the Act.[1]

Duquesne addresses in Part IV of its Comments the Commission's proposed rate methodology for conduits under Section 224(e), which again is an adaptation of its current historical-cost methodology. Wholly apart from being contrary to the Act, as discussed above, the Commission's proposed methodology raises serious concerns because historical-cost recovery for conduit systems -- such as that proposed by the Commission -- would result in the gross under-recovery of the true economic value or cost of electric conduits. Electric conduit systems, such as those of Duquesne, are often mostly depreciated and the replacement or expansion for electric conduit systems is highly expensive. Therefore, rates based on the recovery of historic costs will not come close to reflecting the true economic replacement costs of Duquesne's electric conduit system. As such, the Commission's proposed conduit methodology could require a unique, valuable resource to be sold at prices <u>far below</u> any reasonable measure of its true economic costs and societal value and would result in Duquesne and its electric utility customers subsidizing the telecommunication companies' use of

[1]Duquesne also incorporates by reference and relies upon its comments dated June 27, 1997 filed in response to the Commission's March 1997 Pole Attachment Notice concerning the Commission's re-evaluation of its historical-cost rate methodology under Section 224(d) of the Act for attachments made to electric poles.

its conduit. Such a result would be contrary to Congress' clear intent expressed in Section 224(e) and the 1996 Act as a whole.[2]

Duquesne briefly addresses in Part V of its Comments the Commission's request for comments concerning whether it should adopt a rate methodology to determine a just and reasonable rate for access to utility rights-of-ways or whether such rates should be addressed on a case-by-case basis. Duquesne recommends that the Commission address access to utility rights-of-ways on a case-by-case basis.

Duquesne will not address in these comments attachments to transmission towers or wireless attachments in general because these topics are outside the scope of this proceeding. Both of these topics are subject to petitions for reconsideration pending in CC Docket 96-98. Accordingly, the Commission, properly, has not included them in the current NPRM.

II. DUQUESNE'S GENERAL, OVERVIEW COMMENTS

Duquesne submits that (1) Section 224(e) mandates the use of negotiated, market-based rates grounded on economic -- not historical -- costs for pole attachments and conduit used by cable systems and telecommunication carriers for providing telecommunication services; (2) any default rate formula employed by the Commission

[2]Again, Duquesne incorporates by reference and relies upon its comments dated June 27, 1997 filed in response to the Commission's Pole March 1997 Attachment Notice concerning the Commission's proposed historical-cost rate methodology for conduit under Section 224(d) of the Act.

under Section 224(e) should be based on forward-looking, economic replacement costs and not on historical costs; and (3) the Commission should adopt rules to ensure "good faith" negotiations by the providers of telecommunication services before recourse to the Commission, regardless of the rate methodology adopted by the Commission. Each of these issues is discussed in turn below.

A. Section 224(e)(1) Mandates Negotiated, Market Based Rates

Section 224(e)(1) as amended by the 1996 Telecommunications Act provides as follows:

> The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1996, prescribe regulations in accordance with this subSection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

47 U.S.C. § 224(e)(1) (emphasis added).

Thus, the regulations developed by the Commission under Section 224(e) are to govern attachment charges for telecommunications carriers only in those instance "when the parties fail to resolve a dispute over such charges." This language reflects Congress' intent that voluntarily negotiated, market-based rates should be the fundamental means of setting pole attachment rates for telecommunication carriers. Indeed, the legislative history of Section 224(e) expressly states that subSection (e)(1) was added in order "to allow parties to negotiate the rates, terms, and conditions for attaching to poles, ducts, conducts, and rights-of-way owned or controlled by utilities."[3] Congress thus recognized the important role of an open, pro-competitive market under Section 224(e) and provided for government-imposed rates only as a fallback.

Congress' provision for negotiated, market-based rates in Section 224(e) is in accordance with the overall goal and objective of the 1996 Telecommunications Act which is "to provide for a pro-competitive de-regulatory national policy framework" for the provision of telecommunication services.[4] The Commission has observed in the context of the interconnection provisions of the 1996 Act that the pro-competition objectives of the 1996 Act can be best achieved by utilizing forward-looking economic costs for ratemaking, which best replicate the conditions of a competitive market, instead of historical, embedded costs.[5] Negotiated, market-based rates for pole attachments and conduit used by cable systems and telecommunication carriers to provide telecommunication service reflect the true economic costs and benefits to the parties. Such rates reflect the economic replacement cost for the pole or conduit, as they are reached with the knowledge of both parties that a new facility is an alternative to the use of the utility facility, as well as the economic cost of other

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[3]H.R. Rep. No. 104-458, at 207 (1996) (emphasis added).

[4]Id. at 1.

[5]Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499 (1996) ("Interconnection Order"), ¶¶ 620, 632, 679, and 705.

available alternatives which may be less than that for a new facility. Negotiated, market-based rates also would include terms and conditions other than pricing that would be of economic benefit to the parties which may serve to increase or decrease the negotiated rate.

Therefore, the Commission's regulations under Section 224(e) should be structured to allow "good faith" negotiations aimed at reaching pro-competitive agreements grounded on market-based economic costs and benefits as the prevailing means of determining rates for access by telecommunications carriers to the infrastructure owned by electric utilities. Prescriptive artificial, regulated rates should be avoided in keeping with this Congressional intent. In this regard, Section 224(e)(1) does not mandate the application of a historical-cost recovery rate methodology or any other particular rate methodology. It simply provides that rates shall be "just, reasonable, and nondiscriminatory."

The Commission recognizes the preference for negotiated, market-based rates set forth in Section 224(e)(1) and acknowledges that "negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved." NPRM ¶ 12. The Commission, however, proposes the same historical-cost formulaic rate methodology for Section 224(e) (with modifications for unusable space) that is currently in place under Section 224(d). Duquesne believes that such a rigid, historical-cost formulaic approach is contrary to the mandate expressed by Congress for negotiated agreements which the Commission itself recognizes is the preferred approach for resolving pole attachment issues.

There are a number of reasons why the Commission's proposed adaptation of its historical-cost rate methodology under Section 224(d) is inappropriate under Section 224(e). These include:

- First, the language of Section 224(e) and its legislative history reflect, as discussed above, a clear preference "to allow parties to negotiate the rates" as well as the related terms and conditions of providing access to a utility's infrastructure. The Commission's establishment of a historical-cost formulaic recovery methodology would, as a practical matter, foreclose the negotiation of market-based rates grounded on the true economic costs and benefits to the parties. Attachers could simply insist on the Commission's historical-cost formulaic rate, where lower (as most usually would be the case), with the knowledge that the Commission would support them in any complaint filed with the Commission.

- Second, the Commission's proposed historical-cost rate methodology conflicts with Congress' overall purpose in enacting the 1996 Telecommunications Act "to provide for a pro-competitive de-regulatory national policy framework" for telecommunication services. The Commission and Chairman Hundt have articulated on numerous occasions that rates based on embedded, historical costs do not further Congress' goal for creating a pro-competitive environment for the provision of telecommunications services.[6] Rather, the Commission has proclaimed that the pro-competitive objectives of the 1996 Act can be best achieved by utilizing forward-looking economic costs as the basis for rates.[7] As discussed, market-based rates reflect forward-looking economic costs. Moreover, as discussed further in Section II.B below, any default formulaic approach adopted by the Commission under Section 224(e) should therefore be based on forward-looking costs, not historical costs, in order to be consistent with the Congressional purpose of the 1996 Telecommunications Act.

- Third, Congress' expressed preference for negotiated, market-based rates necessarily reflects Congress' recognition that a utility's rates for access to its infrastructure need not be identical for all attaching entities. Rather,

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[6]See, e.g., Interconnection Order, ¶¶ 620, 679; Reed Hundt, FCC Chairman, speech before the Alex. Brown & Co. "Media & Communications '96 Conference," 1996 FCC LEXIS 5145 (September 17, 1996) ("Hundt September 17, 1996 Speech"); Reed Hundt, FCC Chairman, speech before the Business Development Associates, Antitrust Conference for Corporate General Counsels, 1996 FCC LEXIS 5935 (October 22, 1996) ("Hundt October 22, 1996 Speech").

[7]Id.

Section 224(e)'s primary reliance on negotiation may necessarily result in some differentiation in rates. For example, the other terms and conditions of a negotiated agreement may provide a real economic benefit to a telecommunication company which could provide added value to offset a higher negotiated rate. Contrary to this intent of Section 224(e), the historic-cost formulaic approach proposed by the Commission equates as a practical matter to a tariff under which a utility would charge a single uniform rate for a particular type of service. Had Congress desired to impose a tariff-type regulation, it could easily have done so. Indeed, other provisions of the Act provide for tariff-type regulation which stand in clear contrast to Section 224(e).[8]

- Fourth, incumbent local exchange companies are excluded from the provisions of Section 224(e) and are therefore solely dependent on negotiated rates for access to electric utility infrastructure. As reflected in the "Interconnection" provision of the 1996 Act, Congress seeks to create a competitive market place for telecommunication services in which local exchange companies will compete on an equal basis with other

[8]See, e.g., 47 U.S.C. § 203.

telecommunication carriers.[9] Therefore, Congress did not intend for significant differences between negotiated, market-based rates for local exchange companies not covered under Section 224(e) and those provided other telecommunications carriers under the umbrella of Section 224(e).

In sum, Duquesne believes that the Commission must place primary reliance on market-based rates negotiated by the parties grounded on the economic costs and benefits to the parties. The Commission therefore should not establish a rigid, formulaic approach for prescribing pole attachment and conduit rates -- particularly a historical-cost formulaic methodology -- but should adopt general rules setting forth broad parameters for determining just and reasonable rates. Nevertheless, were the Commission to adopt a formulaic approach, that approach should provide for a range of presumptive just and reasonable rates in keeping with Congress' expressed preference for negotiated rates. Additionally, as discussed further below, any formulaic approach that might be adopted by the Commission must allow for the full recovery of all forward-looking replacement costs associated with pole attachments and conduits.

[9] See 47 U.S.C. § 251.

B. Any Formulaic Rate Methodology Under Section 224(e) Should Be Based On Forward-Looking Economic Costs

If the Commission were to adopt a formulaic rate methodology, such a methodology must be based on forward-looking costs -- not embedded historical costs — in order to be consistent with Congress' pro-competitive objectives embodied in the 1996 Telecommunications Act. The Commission in its 1996 Interconnection Order expressly recognized that "a pricing methodology based on forward-looking economic costs best replicates . . . the conditions of a competitive market."[10] As the Commission observed, "[i]n dynamic competitive markets, firms take action based not on embedded costs, but on the relationship between market-determined prices and forward-looking economic costs."[11] Chairman Hundt has similarly observed that "[o]nly forward-looking cost concepts are consistent with a competitive market."[12]

Thus, as recognized by the Commission, historic costs have no relationship to competitive market prices and the pro-competitive objectives of the 1996 Telecommunications Act. Embedded, historical costs neither reflect the cost faced by the telecommunications carrier seeking entry by duplicating a utility's facilities or by a

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[10]Interconnection Order, ¶ 679. The Commission's Interconnection Order was reversed on jurisdictional grounds by the court in Iowa Utilities Board v. FCC, No. 96-3321, 1997 U.S. App. LEXIS 18183 (8th Cir. July 18, 1997). The court's decision did not, however, address or evaluate the merits of the forward-looking methodology adopted by the Commission in the Order.

[11]Id. at ¶ 620; accord International Settlement Rates, Report and Order, FCC 97-280, IB Docket 96-261 (August 18, 1997) ("Settlement Rates Order"), ¶41.

[12]Hundt September 17, 1996 Speech at #10.

utility expanding its pole distribution or conduit facilities to accommodate access by telecommunication carriers. As such, the Commission's proposed historical-cost methodology could lead to uneconomic use being made of a utility's pole and conduit resources. For example, historical based rates for Duquesne's conduit would be far less than the forward-looking replacement costs. So long as the Commission requires Duquesne and similarly situated utilities to make conduit available to providers of telecommunication services at unrealistically low historical-cost levels, such providers will have no incentive to pursue other feasible alternatives even if those alternatives are less costly than the forward-looking replacement costs for conduits. By the same token, Duquesne and similarly situated utilities will have no incentive to add new conduit capacity to their systems, for they will simply lose more money based on the Commission's historical-cost rates versus current value-based rates. Such a misallocation of societal resources is contrary to the pro-competitive policies embodied in the 1996 Telecommunications Act as well as fundamental economic principles.

In contrast, rates based on forward-looking replacement costs will avoid such a misallocation of resources. As Chairman Hundt observed with respect to interconnection rates under Section 251 of the Act:

> If the price the entrant must pay is economic user cost with economic depreciation, based on forward-looking, or replacement cost -- i.e., reflects current market value -- then

> the incumbent doesn't get left holding the bag. It gets paid enough to continue to invest in, to maintain, to operate, to profit reasonably from, its network.[13]

A utility's recovery of forward-looking costs, together with reasonable profit, would therefore encourage a utility to invest in its conduit or pole network to the benefit of telecommunications carriers and cable systems providing telecommunication services, assuming the rates based on forward-looking economic costs were lower than other reasonable alternatives available to such telecommunication providers. If rates based on forward-looking costs were higher than other alternatives, it would be an uneconomic use of societal resources for the Commission to grant access to the utility's pole or conduit system at the lower historical-cost based rates.

Thus, rates based on forward-looking economic costs "will send the correct signals for entry, investment and innovation."[14] As stated by Chairman Hundt, the correctness of employing a forward-looking economic cost methodology is "obvious and clear."[15] There is no reason why the Commission should not follow the "obvious

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[13]Hundt October 22, 1996 Speech at #17.

[14]Federal-State Joint Board on Universal Service, Report and Order, FCC 97-157, CC Docket 96-45 (May 8, 1997) ("Universal Service Order"), ¶ 224.

[15]Hundt October 22, 1996 Speech at #18. Chairman Hundt has correctly observed, however, that it may be necessary to allow the recovery of stranded historical cost in transitioning from a regulated to a competitive marketplace. See Reed Hundt, FCC Chairman, speech before the National Association of Regulatory Utility Commissioners Communications Committee, 1997 FCC LEXIS 1023, (February 25, 1997) ("Hundt February 25, 1997 Speech").

and clear" course with respect to rates charged by electric utilities under Section 224(e) of the Act.

In its reply comments to the March 1997 Pole Attachment Notice, MCI states that Section 224(i) "appears to preclude the use of forward-looking cost methods for regulating pole attachment rates."[16] According to MCI, "[Section] 224(i) appears to codify the recovery of forward-looking costs through non-recurring make ready charges rather than through recurring rates."[17]

Section 224(i) does no such thing. It simply precludes an entity from bearing "the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity . . . ." Section 224(i) does not address -- contrary to MCI's suggestion -- the rate methodology to be employed for establishing recurring rates. That is addressed in Section 224(e) which reflects, as discussed, Congress' clear preference for negotiated rates based on the economic costs and benefits to the parties.

The Commission must employ a forward-looking cost methodology in any formulaic approach adopted under Section 224(e) in order to abide by Congress' intent

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[16]Reply Comments of MCI Telecommunications Corporation, CS Docket No. 97-98 at 18, August 11, 1997 ("MCI Reply Comments").

[17]MCI Reply Comments at 19.

in the 1996 Act, notwithstanding the historical-cost based methodology used under Section 224(d). Indeed, Section 224(d) was expressly written "to give the FCC the discretion to decide when [the use of] historical-cost data would be appropriate."[18] Accordingly, nothing precludes the Commission from also using forward-looking costs under 224(d) and it should do so for the same reasons as expressed above as well as those set forth in Duquesne's comments dated June 27, 1997 with respect to the March 1997 Pole Attachment Notice. Although arguably it may have been appropriate initially to employ a historical-cost methodology under Section 224(d) for a fledging cable industry, that is no longer the situation. The cable TV industry is well established and should pay competitive based rates similar to providers of telecommunication services under Section 224(e).

In sum, meaningful negotiation as sought by Congress under Section 224(e) can occur only when any default pricing mechanism established by the Commission is somewhere close to the price to which the parties would agree in a competitive market. A formulaic methodology premised on forward-looking economic costs satisfies this criterion; the Commission's proposed historical-cost methodology does not. Accordingly, to the extent the Commission chooses to employ a default formulaic approach under Section 224(e), the formula must be based on forward-looking costs.

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[18] Monongahela Power Co. v. FCC, 655 F.2d 1254, 1256 (D.C. Cir. 1981).

C. The Commission Should Adopt Rules To Ensure Good Faith Negotiations Under Section 224(e) Before Allowing Recourse To The Commission

To implement Congress' preference for negotiations among the parties to be the primary means of resolving pole attachment disputes, the Commission proposes to require a complainant under Section 224(e) "to include a brief summary of all steps taken to resolve its dispute before filing a complaint" as required by its current rule for complainants under Section 224(d). NPRM ¶ 12. The Commission seeks comments on the proposed extension of its current rule to complainants under Section 224(e). Id.

Duquesne fully supports the Commission's proposed extension of its current rule to require telecommunication carriers or cable systems seeking access under Section 224(e) to provide telecommunication service to negotiate and attempt to resolve any disputes with a utility before filing a complaint with the Commission. However, Duquesne believes that additional requirements are necessary to ensure that such entities engage in "good faith" negotiations prior to filing a complaint.

First, Duquesne believes that the Commission should require telecommunication carriers or cable systems seeking access to provide telecommunication service to negotiate for a certain minimum period of time as evidence of good faith before filing a complaint with the Commission. Such a requirement would preclude prospective attachers from running to the Commission without first engaging in good faith negotiations. Duquesne believes that a 180-day time period would be appropriate.